



Fuller who, in her Order of June 19, 2000, denied claimant's request.<sup>2</sup> Claimant asserts the Administrative Law Judge erred in denying her request for attorney fees.

### **Findings of Fact and Conclusions of Law**

After reviewing the entire record, the Board finds as follows:

On February 20, 1998, Administrative Law Judge Kenneth S. Johnson entered an award denying permanent partial disability benefits which was timely appealed to the Board. On April 13, 1999, the Board determined the award of the ALJ should be modified to award permanent partial disability benefits but based upon a 10 percent impairment of function rather than a work disability or the permanent total disability alleged by claimant. Both claimant and respondent appealed the Board's decision to the Kansas Court of Appeals.<sup>3</sup> On October 8, 1999, while the appeal to the Court of Appeals was still pending, demand for payment pursuant to K.S.A. 44-512a was sent by claimant's counsel to respondent and its insurance carrier. Subsequently, the claimant filed a Motion for Penalties and for Interest on Compensation and requested attorney fees.

Following its prior decisions,<sup>4</sup> the Board determined no benefits were due claimant under K.S.A. 1999 Supp. 44-556 because all weekly permanent partial disability benefits became due before the ten-week period next preceding the entry of the Board's Order.

Claimant now seeks an award of attorney fees for her unsuccessful prosecution of her request for penalties and interest. Conversely, respondent asks that the ALJ's denial of attorney's fees be affirmed because all amounts due claimant were paid in full and on time. Respondent further argues that this case presents a similar factual situation and issue as was presented to the Board in Byers v. Morton Buildings, Inc.<sup>5</sup> In Byers the ALJ

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<sup>2</sup> During oral argument to the Board on the appeal of Judge Fuller's December 28, 1999, Order, the parties had agreed that if the Board determined the ALJ erred in not deciding the claimant's motions on the merits, then the Board could proceed to do so without first remanding the matters of penalties and interest to the ALJ for a determination and order. As to the question of a reasonable attorney fee, however, the respondent specifically requested a remand to the ALJ for a hearing on that issue. The Board's Order of May 25, 2000, reversed the ALJ's finding that she was without jurisdiction to decide the matters, denied claimant's request for penalties and interest, and remanded the issue of attorney fees to the ALJ for further proceedings and orders. The ALJ, however, entered her Order of June 19, 2000, without conducting a hearing. Nevertheless, neither party raises that lack of a hearing as an issue on review.

<sup>3</sup> The Kansas Court of Appeals entered its decision on the appeal of the original award on April 28, 2000, affirming the Board's April 13, 1999, Order. On July 13, 2000, the Kansas Supreme Court denied claimant's Petition for Review of that decision.

<sup>4</sup> Landry v. Graphic Technology, Inc., WCAB Docket No. 216,166 (Nov. 1998); Byers v. Morton Buildings, Inc., WCAB Docket No. 173,408 (May 1998); Britt v. Theratronics International, Ltd., WCAB Docket No. 184,811 (Aug. 1997); Hamrick v. Arabian Horse Express, WCAB Docket No. 183,004 (Feb. 1997); Cassady v. Metz Baking Company, WCAB Docket No. 162,695 (Feb. 1996).

<sup>5</sup> *Supra* at Footnote 4.

denied claimant's request for penalties and for attorney's fees. The Board affirmed the denial of both and, with regard to attorney's fees, reasoned that because the Board had previously addressed the identical issues as those raised by claimant in the Application for Penalties, and had resolved those issues contrary to claimant's position, an award of attorney's fees was inappropriate. Respondent had fully complied with the law and a majority of the Board found it unreasonable to assess claimant's attorney's fees against respondent where the current status of the law was contrary to claimant's position. Two board members dissented noting that the Kansas Court of Appeals had never decided the issue and, therefore, claimant's position was not frivolous. Claimant was entitled to preserve the issue for appeal to the appellate courts.

In this case claimant was apparently not preserving the issue for further appeal as no appeal was taken from the Board's May 25, 2000, Order denying penalties and interest. Accordingly, consistent with its previous decisions, claimant's request for attorney fees under the facts of this case should be denied.

**WHEREFORE**, it is the decision of the Appeals Board that the Order of Administrative Law Judge Pamela J. Fuller entered June 19, 2000, should be, and is hereby, affirmed, and claimant's request for attorney's fees is denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant  
D. Shane Bangerter, Attorney for Respondent  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director